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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-206028

DATE: December 14, 1982

MATTER OF: U.S. Coast Guard - Conversion from
Prevailing Rate System to General Schedule -
Pay Retention and Cost-of-Living Allowances

DIGEST:

Department of Transportation questions payment of full cost-of-living allowance (COLA) to Coast Guard employee in Alaska whose position was converted from the prevailing rate system to the General Schedule. Employee retained his WS-6 grade for 2 years and is now on retained pay in excess of GS-11, step 10, under 5 U.S.C. §§ 5362 and 5363 (Supp. III 1979). Employee is entitled to full 25 percent COLA for the area under 5 U.S.C. § 5941 (1976), based on the rate of basic pay for GS-11, step 10, not on his retained rate of pay.

Robert S. Smith, Director, Office of Personnel and Training, Department of Transportation (DOT), Washington, D.C., requests a decision as to whether a Coast Guard employee who is receiving pay retention benefits, because of the reclassification of his position from the prevailing rate system (wage system) to the General Schedule (GS), is eligible to receive the 25 percent cost-of-living allowance authorized by 5 U.S.C. § 5941 (1976), and implementing regulations in Part 591, Title 5, Code of Federal Regulations (1982). For the reasons set forth below, we hold that an employee who is receiving retained pay under the provisions of 5 U.S.C. § 5363 is entitled to receive the full cost-of-living allowance for which he is eligible under 5 U.S.C. § 5941, based on the maximum rate of basic pay of the General Schedule position.

The DOT reports that the WS-6 position of a civilian employee with the U.S. Coast Guard, Kodiak, Alaska, was reclassified to grade GS-11, effective August 12, 1979. During the period August 12, 1979, to August 11, 1981, the employee was paid at his former wage system rate under the grade retention provisions of 5 U.S.C. § 5362(b)(1) (Supp. III 1979). Thereafter, the employee was placed on indefinite pay retention under 5 U.S.C. § 5363(a)(1) (Supp. III 1979).

The DOT points out that the rate of pay for the employee's wage system position was based on prevailing wages in Kodiak and, therefore, includes cost-of-living considerations. On this basis, DOT contends that payment to the employee of the 25 percent cost-of-living allowance payable to GS employees in Kodiak does not seem appropriate as it results in a windfall to the employee.

Also, DOT questions the continuing applicability of our prior decisions in this area, since those decisions were based on regulations governing the conversion of positions between pay systems, and the Civil Service Reform Act of 1978 (CSRA), Public Law 95-454, October 13, 1978, 92 Stat. 1218, has effected a number of changes with respect to grade and pay retention. For this reason, DOT suggests that the employee be paid the greater of:

- "a. The employee's retained rate of pay, increased by 50 percent of comparability, as appropriate, or
- "b. The pay of GS-11, step 10 plus COLA of 25 percent of that rate of basic pay."

Prior to enactment of the grade and pay retention provisions of the CSRA, an employee whose position was converted from the Federal Wage System to the GS system was entitled to receive a rate of pay under the GS which was not less than the "rate of basic pay" the employee received under the former system. 5 U.S.C. § 5334 (1976); 5 C.F.R. Part 539, Subpart B (1981). Interpreting the conversion regulations formerly contained in Part 539 of Title 5, C.F.R., we held that, even though an unascertainable cost-of-living factor is included in the employee's wage system rate, this factor could not be considered in determining the employee's basic rate of pay in the GS position. 52 Comp. Gen. 695 (1973); 51 Comp. Gen. 656 (1972). The effect of this rule was an unavoidable "pyramiding" of cost-of-living allowances, since an employee would be assigned a GS pay rate comparable to his prior wage system rate, and then receive a cost-of-living allowance based on the "rate of basic pay" for the GS position. See 52 Comp. Gen. 695, above. In an analogous context, we held that the cost-of-living allowance authorized by 5 U.S.C. § 5941 is to be

computed on the rate of pay which attaches to the GS position, and not on the retained pay rate. B-175124, June 2, 1976.

Title VIII of the CSRA made several changes in the provisions of Title 5, United States Code, relating to the protection of employees who are reduced in grade. Among these was the repeal of section 5334(d), providing for retention of salary upon conversion to the GS, and the enactment of sections 5362 and 5363, providing, in part, for grade and pay retention under the circumstances formerly covered by section 5334(d).

Because of the repeal of section 5334(d), current and future employees whose wage system positions are converted to the GS are not subject to the provisions formerly contained in Part 539, Title 5, C.F.R., but are, instead, governed by the grade and pay retention regulations set forth in Part 536. See 46 Fed. Reg. 22,745, April 21, 1981. Nevertheless, the rules stated in Part 536, like the conversion regulations in Part 539, base the determination of an employee's rate of retained pay on his "rate of basic pay" under the former schedule, and define "rate of basic pay" as the employee's pay rate before deductions, and exclusive of additional pay. See 5 C.F.R. §§ 536.102, 536.205 (1982). Thus, the principles expressed in our decisions 52 Comp. Gen. 695 and 51 Comp. Gen. 656, cited above, continue to apply in the context of pay retention.

It appears that the formula DOT has designated as alternative "a" is based on its construction of the pay retention provisions of 5 U.S.C. § 5363(a). The specific language of section 5363(a) provides that an employee meeting certain criteria is entitled to basic pay at his former rate "plus 50 percent of the amount of each increase in the maximum rate of basic pay payable for the grade of the employee's position * * *." As noted previously, we have consistently stated that the cost-of-living allowance authorized by section 5941 is not part of an employee's basic compensation. 52 Comp. Gen. 695, above. See also Dempsey A. Anderson, et al., B-193977, June 9, 1980. On this basis, the 50 percent limitation stated in 5 U.S.C. § 5363 would not apply to section 5941 allowances.

With respect to alternative "b," we fail to understand the basis for the suggestion that the employee be paid at the rate fixed for his GS position plus 25 percent COLA. The DOT states that the employee was placed on indefinite pay retention under 5 U.S.C. § 5363, and, therefore, his retained pay is to be established under 5 C.F.R. § 536.205(b). Since the DOT letter indicates that the employee's prior rate of basic pay exceeds the maximum rate for grade GS-11, the employee is entitled to retain the prior rate. In addition, pursuant to B-175124, June 2, 1976, cited above, he is entitled to the 25 percent COLA for the Kodiak, Alaska, area, computed on the basic rate of pay for GS-11, step 10, not on his full retained pay rate.

The employee's retained pay and cost-of-living allowance should be determined in accordance with the foregoing discussion.

for *Shelton J. Avolan*
Comptroller General
of the United States